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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

BOARD OF REGENTS, THE)	
UNIVERSITY OF TEXAS SYSTEM et)	
al.,)	Case No.
Plaintiffs,)	18-392-GBW
v.)	
)	
BOSTON SCIENTIFIC CORP.,)	
)	
Defendant.)	

- - - -
Wilmington, Delaware
Thursday, January 2, 2023
Pretrial Conference
- - - -

BEFORE: HONORABLE GREGORY B. WILLIAMS
UNITED STATES DISTRICT COURT JUDGE
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APPEARANCES:

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-and-

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P R O C E E D I N G S

(REPORTER'S NOTE: The following pretrial conference was held in Courtroom 6B, beginning at 3:00 p.m.)

THE COURT: All right. Good afternoon. You may be seated.

All right. We are here for the final pretrial conference in Board of Regents versus Boston Scientific. Civil Action No. 18-392.

Let's start by having counsel put your appearances on the record.

MR. STAMOULIS: Good afternoon, Your Honor.

Stamatios Stamoulis here on behalf of the plaintiffs. With me at counsel table are Michael Shore and, the Chijioke Offor and Corey Lipschutz.

Thank you, Your Honor.

MR. FARNAN: Good afternoon, Michael Farnan for Boston Scientific. With me today are Tim Grimsrud, Chad Drown, Lauren Barta, David Gross, Kate Razavi, Evan Kline-Wedeen who are from Faegre Drinker. And from Boston Scientific Matt Truitton.

THE COURT: All right. Good afternoon, all.

All right. So we have a number of things to get to today. The first thing that I wanted to talk about or

1 deal with was to the UT's application for judicial notice.
2 There's a statement of uncontested facts and that's sort of
3 where you deal with those type of issues.

4 To the extent that a fact has not been agreed
5 to, UT must prove it at trial.

6 Next issue is dealing with sequestering of
7 corporate representatives. For that, I'm going to grant
8 UT's request. Representatives are permitted to attend trial
9 pursuant to Federal Rule of Evidence 615(2).

10 MR. SHORE: Your Honor, may I point out one
11 thing to the Court quickly?

12 THE COURT: Yes.

13 MR. SHORE: I have been doing this 32 years, and
14 I understand now that every year you see something new. So
15 the request for judicial notice, I'm not sure if you're
16 aware of this, every fact in it was a fact that Boston
17 Scientific admitted in response to the complaint. In
18 32 years, I have never seen a party refuse to stipulate to
19 facts that they have already admitted to be true in their
20 response to a complaint. So I just want to make sure the
21 Court was aware that what they are telling us that we have
22 to go prove and spend our very limited amount of time that
23 we're provided to do are facts that they have admitted. I
24 think it's an effort to force us to waste time, I think
25 it's -- I have never seen in it 32 years of practicing law

1 for someone to admit facts in the response to a complaint
2 and then refuse to stipulate to the facts that they
3 admitted.

4 So, I just want --

5 THE COURT: You tried to get them to include
6 those facts in the uncontested facts?

7 MR. SHORE: Yes; and they refused and they are
8 not contested, they are admitted. And so that is amazing to
9 me that we now have to go through -- I understand the Court
10 has limited time, you have a busy docket, but one of the
11 reasons why the rules are if we have to go prove facts that
12 they refuse to admit, they have to pay our attorneys' fees.
13 That's the rules. Here we have to prove facts that they've
14 admitted.

15 Now there may be a few -- I just got a note from
16 my colleague, there may be a few, a very few, but the vast
17 majority of facts that are that judicial notice are facts
18 that they've admitted to and refused to stipulate.

19 THE COURT: Okay. So let's do this, you guys
20 have time. Certainly if there are facts that are clearly
21 admitted to in the pleadings, those facts -- UT should not
22 be required to prove those facts, so what I would suggest is
23 that the parties meet and confer further about this, try to
24 reach agreement on those statements of fact that are clearly
25 admitted. If there a couple that there are some question

1 about, then we can deal with those, then those seem
2 reasonable for UT to be able to -- to have to prove at
3 trial. But if there are some that are clearly admitted, if
4 there's a fact in the complaint and in your answer you say
5 admitted, then let's not waste time like that.

6 And to the extent, you know, we have issues like
7 that where I feel -- we get to trial and I feel one party is
8 being unreasonable, I'm going to reserve the right to charge
9 time against that party for that, whether it deals with
10 objections or issues that should have been sort of agreed to
11 in advance, etc.

12 So moving on to the next issue --

13 MR. GRIMGRUD: Your Honor, just for the record,
14 we disagree with the characterization of how they
15 characterize our pleading, but we'll meet and confer and
16 definitely try to resolve any issues.

17 THE COURT: Okay.

18 MR. GRIMGRUD: Per your instructions.

19 THE COURT: All right. Next deals with the
20 request for a surrebuttal in closing argument by Boston
21 Scientific. The plaintiff gets rebuttal and we'll stop it
22 at that -- after UT's rebuttal, that's where it will stop.

23 Next scope of accused products, it's unclear to
24 the Court whether there's still an issue as to including
25 substantially similar products and the products that UT

1 accuses of infringement, whether that's still something
2 that's an issue. And if so, I want to hear how that impacts
3 the trial, if at all.

4 MR. OFFOR: Yes, Your Honor, I do believe it is
5 still an issue. The University of Texas.

6 We are alleging that the Synergy products, both
7 those that were sold 2015 and later, are at issue as well as
8 their clinical products that were in the United States and
9 used in the clinical trials beforehand, so going back to
10 2011, our full damages period.

11 THE COURT: But don't you have to identify the
12 specific products. How is the jury going to determine if
13 what substantially similar products are and whether or not
14 those products infringe?

15 MR. OFFOR: Yes, Your Honor, we've identified
16 them as Synergy -- let me say this differently. They are
17 the same products, from our understanding, and from the
18 evidence that we have as the synergy commercial products.
19 They just go by the name -- they have a Synergy clinical and
20 a Synergy first human use.

21 THE COURT: Okay. So those are the products
22 that Synergy clinical and Synergy first human house.

23 MR. OFFOR: Or FHU.

24 THE COURT: Okay. So you will specifically
25 identify them?

1 MR. OFFOR: Yes.

2 THE COURT: So when we instruct the jury, they
3 won't just be stuck with substantially similar products.

4 MR. OFFOR: Yes.

5 THE COURT: Okay.

6 MR. DROWN: Good afternoon, Chad Drown from
7 fakery drinker.

8 What we understand the accused products are the
9 Synergy stents that are identified in their infringement
10 contentions and identified in their expert reports
11 infringement opinion. Those are Synergy stents.

12 There's not substantially similar products that
13 are floating about that nobody knows what they are talking
14 about that are addressed. And so we should just be
15 identifying Synergy stents as the accused products that are
16 at issue in the case. It's pretty simple. That's what
17 their expert said, we believe, and that's what's at issue in
18 the case. They shouldn't be talking about substantially
19 similar products. And that's why we didn't want to have a
20 description here in the pretrial order of accused products
21 that included something about some vague notion of
22 substantially similar products.

23 THE COURT: Okay. So are you saying that they
24 haven't previously identified Synergy clinical and Synergy
25 first human use?

1 MR. DROWN: I would have to first double when he
2 can infringement contentions in Dr. Pitt's report, but they
3 would have to represent to the Court that those specific
4 products are in fact in those. And we can double check
5 that. But we think the products are the Synergy stents.
6 And if he, Dr. Pitt, specifically identified something else,
7 then we can deal with that, but we don't want to have a
8 pretrial order that has a vague thing about substantially
9 similar products.

10 THE COURT: All right. Okay.

11 MR. OFFOR: Your Honor, in paragraph 3 of our
12 complaint, we identify the products that were sold after
13 2015 and we also say the products that were used in the
14 clinical trials as well. And through discovery, we've
15 discovered that those -- the names that they go by are
16 Synergy clinical and Synergy first human use. And so those
17 are at issue. We have interrogatory responses that admit
18 that those things were -- those products, certain of those
19 products were imported in 2012, I believe it's a response to
20 interrogatory 21. And so we have the evidence of that, we
21 brought this up before.

22 THE COURT: Okay. So are there any specific
23 instructions where you've identified those products and
24 where, you know, there's some disagreement between the
25 parties?

1 In reading the instructions, I don't remember
2 seeing Synergy clinical and Synergy first human use
3 anywhere.

4 MR. OFFOR: Yeah, it's not in the instructions,
5 but in the characterization of the product, we said that it
6 includes these Synergy stents -- that is what they call
7 them -- and there's certain of them that we have damages
8 numbers for, because they were sold after 2015 commercially.
9 And then there's other stents that we know from the
10 testimony that were in, and we believe that they go by the
11 name "Synergy." They've said they haven't changed anything
12 about the Synergy coding, which is the portion that we are
13 accusing of infringement, so they are a part of this case
14 and they've been on notice of that.

15 THE COURT: Okay.

16 All right. So you say that these products are
17 included in the term "Synergy stents"?

18 MR. OFFOR: As we've defined it and I believe
19 there's a dispute there on how to define that term, but
20 that's -- our definition should include that.

21 THE COURT: All right. And how do you guys
22 respond to that?

23 MR. DROWN: I guess the argument now is they say
24 Synergy stents are the accused products and not -- and all
25 substantially similar products, so we can take that and put

1 that away.

2 And now they are saying Synergy stents are the
3 ones that were sold commercially and then -- but that
4 includes some clinical one and some other grouping of stents
5 is how I understand what they're saying now.

6 I'm not aware of infringement contentions that
7 deal with Synergy stents other than the commercially sold
8 version, Your Honor. We can look at that, we're looking at
9 the infringement contentions now and we're not seeing that.
10 They haven't shown us or you that today, but we can check
11 that.

12 But what I think we've gotten to some resolution
13 is that the pretrial order can say Synergy stents are what's
14 accused of infringement and delete the substantially similar
15 portion.

16 THE COURT: Yeah, I think that's what -- at
17 least you've agreed that Synergy stents is the term that
18 will be used. What included in that you guys will work out.

19 All right. With respect to the allocation of
20 time for trial, that's going to stay what we previously gave
21 you. So that's not going to change.

22 In terms of resolution of disputes, the pretrial
23 order provides that the parties must bring disputes about
24 deposition designations, exhibits and demonstratives to the
25 Court's attention. So the Court is instructing the parties

1 to do the following: To jointly notify the Court via
2 e-mail, both to the Court's e-mail address, which will be
3 provided with a cc -- with also including the direct e-mail
4 address of my law clerk that's on this case, Joe Liss, and
5 he will give you his e-mail address, of any objections to
6 witnesses, deposition designations or other evidence to be
7 presented that trial day before 6 a.m. on that trial day.

8 And the parties should arrive at the Court each
9 day no later than 9 a.m. prepared to discuss any outstanding
10 issues with the Court before we get started with the jury at
11 9:30.

12 With respect to copies of deposition
13 designations and witness binders, instead of two copies, the
14 Court is instructing the parties that the Court requires
15 three copies of all witness binders and deposition
16 designations; one for the court reporter, one for the clerk
17 and one for the judge.

18 Next issue is with respect to the phasing, the
19 two phases in this trial and the witnesses. I didn't see
20 any designation about what witnesses will be used in phase
21 one and phase two, whether there are any distinctions, so I
22 wanted to clarify whether the parties anticipate objections
23 to use of certain witnesses or evidence in phase one.

24 MR. DROWN: Your Honor, I can address that on
25 behalf of the defendants.

1 We have provided, under the pretrial exchange
2 process, an updated list in good-faith of witnesses that we
3 intend to call live, just this week I think we did it. And
4 we included phased witnesses.

5 THE COURT: Okay.

6 MR. DROWN: So we included in our first phase
7 witnesses, it was: Dominic Allocco, a Boston Scientific
8 witness. Aparna Bhawe, a Boston Scientific witness as will
9 call live. Then we had Yen-Lane Chen, a may call live
10 witness from Boston Scientific. And our expert, technical
11 expert Dr. Mooney.

12 We have not received a phased version of that
13 from the plaintiffs of what witnesses are going to be in
14 phase one and what witnesses are going to be in phase two.
15 And that would be, of course, helpful.

16 One issue we do want to just put out there is
17 that Mary Beth Moynihan from Boston Scientific will not be
18 coming in phase one, she is a phase two witness, that's the
19 knowledge intent witness that they -- their representative
20 met with. And they want to talk to her about knowledge and
21 intent because one of their employees, that the Boston
22 Scientific person that they sent a presentation to.
23 Knowledge, intent that whole issue is in the second phase,
24 as Your Honor as ordered, so Mary Beth Moynihan will not be
25 coming in phase one.

1 The other thing we want to let the Court know
2 and the plaintiffs is that as we continue to try to narrow
3 the case and streamline things, we're not going to be
4 calling at trial live Yen-Lane Chen from -- she's a former
5 Boston Scientific engineer. She'll just be by deposition.
6 She's not going to be called live.

7 So we've provided the grouping of phases. And
8 then we have the second phase, we have second phase
9 witnesses as well. We can let Your Honor know what those
10 are, but if we get to that phase, there will be a damages
11 expert, we have a physician that we can talk about.

12 In one thing that we can raise now or later,
13 Your Honor is -- and they may have the same issue, but these
14 physician experts are actual physicians, interventional
15 cardiologists that do these heart surgeries. And we do have
16 a scheduling issue for our interventional cardiologist who
17 has a full patient surgery schedule that he's cutting out
18 time for in this case that we can talk about, potentially,
19 if there's a second phase having to do a -- calling him out
20 of order. It may be we don't have to call him out of order,
21 but he has a limited window that he can break away from
22 surgeries, fly here and fly back the same night.

23 THE COURT: Okay. We can deal with that if and
24 when necessary.

25 MR. SHORE: Your Honor, we'll supplement and

1 provide a list broken into phase one and phase two.

2 One of the issues that is going to come up is
3 that we have subpoenaed Boston Scientific to bring people to
4 the Court capable of testifying on certain subjects. They
5 have refused and said that they are not going to honor that
6 subpoena and we can talk about that later.

7 The second issue that is going to come up as far
8 as first phase, second phase -- I know we have a bifurcated
9 case on willfulness and damages, but they've also -- since
10 the invalidity is in the first phase, we have to be able to
11 show copying because copying is a response to an invalidity
12 challenge. So that is one of the reasons why we are talking
13 about these Synergy human use or Synergy trial products;
14 using the patented invention is infringement, not just
15 selling and offering to sell, but using it.

16 They got detailed disclosures of the invention
17 in 2009, and it is our position they've used that to
18 actually copy the invention through the trials. And we need
19 to be able to show that they got the invention disclosed to
20 them and that through their clinical trials they literally
21 copied it, which is why it looks exactly like our invention
22 in the end. So that's an issue that will come up because,
23 as I'm sure the Court knows, actual copying is one of the
24 rebuttals to an invalidity case. And we believe we have
25 here an actual copying case.

1 So we need to figure out in our bifurcation -- I
2 mean, we need to be able to show that they got the patent,
3 they got a presentation on the patent, they got all the
4 information about the patent. They cited the patent in
5 their own patent applications, they actually made arguments
6 to overcome other patents in the same family in their own
7 patent applications. And we believe that that
8 circumstantial evidence of actual copying especially since
9 their research and development devices, as to the polymer
10 fiber, look exactly like their finished devices.

11 So I'm not sure how the Court -- we can handle
12 that or how to do that, I'm obviously -- I respect your
13 decision on bifurcation, but we have an actual copying
14 response to their invalidity case, so -- we have evidence
15 that they actually copied the invention. So that's
16 something I think the Court needs to be aware of.

17 I'm not asking you to reconsider your
18 bifurcation, I'm just telling you that this issue is going
19 to come up and we're going to have to at some point deal
20 with it.

21 As far as the witness issue you just brought up,
22 we'll tell them which ones we plan to put in phase one and
23 which ones are solely in phase two, and which ones will be
24 in both, because several of our witnesses will be in both
25 phases.

1 THE COURT: Okay.

2 MR. DROWN: Your Honor, if I may?

3 THE COURT: Yes.

4 MR. DROWN: So, Your Honor, we just heard an
5 argument that we've heard for the first time regarding
6 bifurcation, and that is they plan to present copying
7 evidence as a secondary factor for invalidity.

8 Secondary factors for invalidity relate to an
9 obviousness defense. If we prove -- if we make a prima
10 facie showing of obviousness, they can present evidence of
11 secondary factors, such as long-felt need or copying and the
12 like to try to rebut obviousness.

13 Your Honor asked the parties in an order to
14 identify the evidence that would be part of -- not part of a
15 first phase in our bifurcation briefing. We did that.

16 In the bifurcation briefing, I'm not aware,
17 number one, of them mentioning anything about copying
18 evidence. And we think the reason they didn't do that and
19 they're trying at the last minute today to try to say
20 they're going to present copying evidence is because of
21 this, Your Honor. The reason they didn't do it in their
22 briefing -- if I may approach?

23 THE COURT: Yes.

24 MR. DROWN: The reason they didn't do it in
25 their briefing and their first time today, Your Honor, is

1 because we asked during discovery hey, are you actually
2 going to present copying evidence in this case? We have an
3 interrogatory, it's an Interrogatory No. 5, and I'll read
4 it: To the extent plaintiffs allege with respect to any
5 asserted claim that there exist any secondary considerations
6 of nonobviousness, within the meaning of *Graham v. John*
7 *Deere*, explain in detail the basis for the allegations,
8 including further information.

9 This is their answer: Should Boston Scientific
10 establish the prima facie evidence of obviousness of claim 1
11 or any of the asserted claims of the '296 patent, plaintiffs
12 may rely on at least the following objective indicia or
13 secondary considerations of nonobviousness: Teaching away
14 by prior art.

15 That's it. That's not even a secondary
16 consideration under the law, but they didn't identify
17 anything about copying.

18 It gets worse. The Court actually issued a
19 scheduling order and said, hey, if you want to have anything
20 about secondary considerations, there's a schedule for that,
21 and there's an expert report deadline for that. It's --
22 they can submit a limited reply by defendant to any expert
23 report on objective indicia of nonobviousness, they can
24 submit a reply expert report. When that deadline came and
25 went, they didn't submit one.

1 So in discovery they didn't say anything about
2 copying, in their expert reports and expert discovery they
3 didn't say anything about copying. When we talked about
4 bifurcation and which evidence would be where, they didn't
5 say anything about copying.

6 And now they are trying to save their knowledge
7 and intent of the '296 patent evidence to try to get it into
8 the first phase somehow by now trying to say they are going
9 to show copying. And we don't think under Rule 26(a) and
10 Rule 37(c) that that's permitted, Your Honor.

11 And we have -- so there's no reason why they
12 couldn't have done it if they wanted to during discovery,
13 fact discovery or expert discovery, and so we don't think
14 there should be any mention whatsoever of our knowledge,
15 supposed knowledge of the patent, the fact that we had some
16 meeting with them, the fact that they sent some
17 presentation, anything. They can't sneak this in through
18 some secondary factors.

19 THE COURT: Okay. Are you able to identify
20 anywhere in discovery or in your briefing or anything prior
21 to the deadline that the Court set forth where you've
22 identified copying would be a secondary consideration that
23 could have some bearing on invalidity?

24 MR. SHORE: Yes, it's in our opening expert
25 report. And also they -- and, again -- yes; the short

1 answer to the question is, yes, it's in our opening expert
2 report.

3 And, second, also, this is rebuttal topic, so
4 we -- until they put on whatever evidence they have of
5 invalidity, we're not required to tell them what we're going
6 to rebut to something we haven't seen. So what they're
7 complaining about is they're saying that they want us to
8 disclose everything in rebuttal to their case before we see
9 their case in court. But there was definitely discussion in
10 Dr. Pitt's report, and if it comes to the time -- maybe
11 that's how we spend the 30 minutes before trial that day if
12 that's what they are going to argue. But we can point out
13 in Dr. Pitt's report he talked about what they did was a
14 copy and they basically took the information they had and
15 then suddenly, after many years, talk about long-felt need,
16 after many years of failing in research and development,
17 after buying another company called Lab Code, that did it a
18 different way that failed, they ended up magically using
19 exactly what the University's patent disclosed, that had
20 been disclosed to them in 2009.

21 So if they come up and they start talking about
22 whatever their invalidity case is going to be -- and, again,
23 I haven't seen it yet, but whatever their invalidity case is
24 going to be, we should be able to rebut it, especially on
25 cross-examination of their own experts with whatever it is,

1 because this whole copying thing can just come in through
2 cross-examination.

3 So, again, this is rebuttal to their invalidity
4 case. And if you believe, when the time comes, if we can't
5 show you that we presented this in a fair way in discovery
6 so that they could be prepared for it, then obviously you
7 will make your rulings based upon the record. But I think
8 to make the ruling now is premature, I'm just bringing it up
9 to you in fairness so you will be highlighted on the issue
10 about witnesses.

11 THE COURT: I understand.

12 MR. DROWN: Your Honor, the idea that you don't
13 have to tell somebody in an interrogatory response evidence
14 that you may use until the person is on the stand rebutting
15 something at trial is completely contrary to the Federal
16 Rules of Evidence and the cases regarding disclosure and
17 discovery. We've asked them in interrogatory what secondary
18 factors are you going to rely on and they never said
19 copying, period. Then when the time -- when their expert
20 report came to rebut our expert -- our expert has a --
21 probably over a 100-page report on invalidity; they know
22 exactly what he was going to say.

23 When it came time to respond to that with an
24 expert report from Dr. Pitt from their side where our expert
25 -- they didn't say anything about secondary factors. So

1 they don't get to do it at the first time at trial.

2 And our concern, our concern, Your Honor, is in
3 the opening statement, for example, they just say, they just
4 turn to the jury and we don't have time to stop it because
5 they've already said it, and Boston Scientific knew of the
6 patent, let me tell you, they knew of this. And they
7 shouldn't be able to do it. That's exactly what Your
8 Honor's bifurcation order was dealing with is we're not
9 having willfulness knowledge of the patent evidence in the
10 first phase. And we don't want that to happen, we want Your
11 Honor's order to be honored, and for them to follow the
12 discovery rules where they didn't say it in discovery.

13 THE COURT: Okay. I hear both sides.

14 So what I'm going to ask both sides to do is to
15 submit a letter brief on this issue of no more than five
16 pages on or before the end of the day of this coming
17 Wednesday. And we'll start with having UT submit its
18 opening letter brief on or before the end of the day on
19 Tuesday, and then we'll have Boston Scientific submit its
20 answering letter brief on or before the end of the day on
21 Wednesday.

22 All right. With respect to trial exhibits, I
23 understand there are a number of exhibits that are -- appear
24 on both sides' exhibit list and there are some that are
25 different. So the Court is instructing the parties that to

1 the extent that there are common exhibits, those should go
2 on a joint exhibit list and you should -- so in the end the
3 Court wants one exhibit list: The joint exhibits, and then
4 to the extent that there are only exhibits that the
5 plaintiff will use, you'll have plaintiffs -- you know,
6 whether you say PTX or however you designate it, and to the
7 extent there are Defendant's Exhibits, DTX. But to the
8 extent that there are common exhibits, those are the ones I
9 want you guys to coordinate on to make sure that they are
10 paginated and that both of you are referring to the common
11 exhibit page, the pagination as opposed to however they may
12 have appeared if they were separate. So that's easier for
13 the Court to follow, it will be easier for the jurors to
14 follow.

15 With respect to time during the trial days, so
16 on the first day we will start at 9:00 a.m. On the
17 subsequent days, we'll start with the jury at 9:30, but
18 we'll -- at 9 o'clock we'll deal with any issues that we
19 need to deal with.

20 Typically we'll have a 15-minute break for the
21 jurors in the morning, followed by a lunch break of around
22 45 minutes to an hour, depending on when we stop, and a
23 15-minute break in the afternoon as well. And we will
24 typically try to break for lunch at one o'clock and then
25 we'll finish the day at 5:30. The goal is to try to get the

1 case to the jury by midday on Friday. So that's sort of
2 what we're shooting for.

3 All right. So now let's go -- we're going to go
4 to -- in a minute to the voir dire, but before I jump to
5 that, there's an overall issue that we need to deal with,
6 and this is the -- how we refer to the plaintiff.

7 I know there's a dispute whether we refer to the
8 plaintiff as "University" or "Board of Regents," and so what
9 the Court proposes is that we just refer to the plaintiff as
10 "UT," and then it's not University, it's just UT. It
11 doesn't say University.

12 So what's Boston Scientific's feeling on that?

13 MR. GRIMGRUD: We would say on that, Your Honor,
14 that UT stands for University of Texas, and that's a -- as a
15 technical matter, the plaintiff -- it is the Board of
16 Regents, the Board of Regents owns the patents, they say,
17 not the University of Texas, so that's where -- our
18 preference would be Board of Regents just because we think
19 that more accurately answers who the plaintiff and the
20 patent owner is.

21 THE COURT: I'm not going to refer to it as
22 "Board of Regents," so we'll come up with something else.
23 So how about -- with that, we'll refer to it as "UTBOR"
24 and -- but that's just, you know, seems cumbersome, you
25 know, as I'm reading instructions, so that's kind of -- so

1 that's the -- it's either going to be "UT" or "UTBOR."

2 MR. GRIMGRUD: Yeah, UTBOR, we could also UT
3 Board, either of those, or both are fine.

4 THE COURT: What's your...

5 MR. SHORE: I'm a little -- honestly, I'm a
6 little confused. The witnesses are going to respond,
7 especially witnesses who work for the University of Texas
8 System -- and by the way it's the University -- it's the
9 Board of Regents of the University of Texas System, which is
10 a mouthful, but whether we refer to them in examinations as
11 the "University" -- I mean, no one refers to them as the
12 Board, I mean, it's just not how it's done.

13 But I think we can explain to the jury if you
14 hear UT, the Board, or the Board of Regents, it's all the
15 same, it's all the same person, so if something comes out of
16 a witness' mouth or a lawyer's mouth you just explain, you,
17 not us --

18 THE COURT: Yeah, because we can't control how
19 the witnesses refer to them.

20 MR. SHORE: Right. So I think the way to do it
21 is that you instruct the jury we have a party here of a long
22 cumbersome name, the Board of Regents of the University of
23 Texas System, and sometimes you'll hear it referred to as
24 the "University" or "UT" or "the Board," but you need to
25 understand that all of those mean the same thing.

1 And, of course, the way you instruct them in
2 your instructions, that way -- however you do it, they'll
3 know that if it was referred to in the evidence as "the
4 Board" or "UT" or the "University," it's all the same thing.
5 I think that's what we want to make sure the jury
6 understands is that however they hear it, it all refers to
7 the same thing.

8 THE COURT: Okay. All right.

9 MR. GRIMGRUD: And, Your Honor, we can clarify,
10 you know, with witnesses that it's the Board of Regents and,
11 you know, as necessary, clarify that during the trial.

12 THE COURT: Yeah. We can -- like I said, we'll
13 say whether it's "University, UT, UTBOR, Board of Regents"
14 it's all talking about the plaintiff in this action.

15 MR. GRIMGRUD: Thank you, Your Honor.

16 THE COURT: All right. Moving to the voir dire.
17 I made some markups.

18 Going to number two. So in the instructions
19 here we refer to them as "UT Board," and like I said -- so
20 the first time I say this, then that's when I'll tell them
21 you may also hear it referred to as "University, UT, Board
22 of Regents," it's all the same, referring to the plaintiff
23 in this action.

24 So I'm going to skip when -- the whole UTBOR,
25 Board of Regents sort of disputes that, appears throughout.

1 That's how we're going to handle that.

2 So with -- on number two, the first substantive
3 dispute, we're going to -- plaintiff's suggested two
4 sentences, we're going to accept that first sentence and not
5 accept the second sentence.

6 Moving to page 3 with respect to the question,
7 just edited what's being deleted in the question in number
8 three is being picked up in question four. So question
9 three will just ask: Do any of you know any of these
10 attorneys or law firms I have just named. And then question
11 four will say: Have any of you, or any member of your
12 immediate family, such as a spouse, parent, child or
13 sibling, had any business dealings with or been employed by
14 any of these attorneys or law firms.

15 New question 5, which will capture the old
16 questions 5, 6 and 7 will say: Have you or any member of
17 your immediate family ever had a business relationship with,
18 been employed by or owned stock in UTBOR, TissueGen or
19 Boston Scientific?

20 Then we'll pick up with 8 and that will now
21 become question 6 and so on. 9 is 7. What was proposed by
22 defendants' question 10 is a no. We're not going to include
23 that.

24 What was proposed as question 12 by plaintiffs
25 is a no. We're not going to include that.

1 The end of that question 12: Have any of you or
2 your immediate family ever been employed by the United
3 States Patent and Trademark Office or have any training or
4 work experience with patents, copyrights or intellectual
5 property... that will be asked.

6 13 we revised: Have you or any member of your
7 immediate family ever applied for or obtained a United
8 States foreign patent?

9 Question 15 we revised is: Have you or any
10 member of your immediate family ever been a party to a
11 patent license or negotiated a license agreement?

12 What was proposed as question 17 is a no.

13 Question 18 will be: Do you have any knowledge
14 or experience with medical devices, coronary stents or
15 drug-eluting stents.

16 And what was questions proposed as 20 through 24
17 are no's.

18 And question 28 is a no.

19 So we'll revised it according to that and handed
20 it out.

21 All right. And how we're going to handle voir
22 dire is that, you know, I'll read it and we'll record the
23 "yes" answers in response to each question.

24 When we get to the end, the Courtroom Deputy
25 will begin to seat the panel for any folks that have

1 answered "no."

2 For the folks that answered "yes," to the extent
3 we need them, we'll bring them back to the jury room and
4 counsel will ask follow-up questions.

5 So next we'll move on to the preliminary
6 instructions. Pass markups of those out. This is phase
7 one.

8 First substantive dispute had to do with number
9 three, United States patents. Plaintiff wants a copy of the
10 sample patent contained -- okay. Well, first, in the first
11 sentence: "This case is about..." and Boston Scientific
12 proposed "patents, which is an area unfamiliar to many
13 people" and plaintiffs proposed just "patents," and we'll
14 just say "patents."

15 And the ultimate sentence of that paragraph:
16 During the video reference will be made to a sample patent,
17 a copy of the sample patent will be contained in the juror
18 notebooks for you to follow along.

19 So in the juror notebooks, there will be the
20 copy of the sample patent that's referred to in the video as
21 well as copy of the '296 patent.

22 Moving onto instruction number 7, Burdens of
23 Proof. The first substantive dispute had to deal with
24 preponderance of the evidence. And plaintiffs slightly is
25 what's consistent with the jury instruction in the case law,

1 so it will read: "UTBOR and TissueGens' claims would have
2 to make the scales tip slightly on their side."

3 Moving to that next paragraph, which has to do
4 with clear and convincing evidence that Boston Scientific
5 has the burden to prove. I didn't accept either parties'
6 proposal for that. I tracked the language that comes from
7 the case law to make it precise.

8 So that third sentence will read: "When a party
9 has the burden of proving any claim or defense by clear and
10 convincing evidence, it means evidence that is highly
11 probable that a fact is true." And then we'll pick up with
12 "This is a higher standard of proof..." and keep the rest
13 of that.

14 Next dispute is in instruction number 10, Note
15 Taking. Plaintiffs wanted to include four matters in the
16 juror notebooks. We'll go with the first three; a copy of
17 the '296 patent, a listing of the Court's claim
18 constructions, copy of the sample patent discussed in the
19 video. We won't include pictures of witnesses.

20 That second sentence we'll pick up with "... you
21 have been given a note pad and a pen..." and continue.

22 Moving to the next substantive dispute that had
23 to deal with instruction number 13, Course of the Trial.
24 And the substantive dispute is the last sentence. In there,
25 we will go with plaintiff's language that will read:

1 "Finally, plaintiffs, UTBOR and TissueGen, may offer
2 rebuttal witnesses to Boston Scientific's claims and
3 defenses."

4 In instruction 14, Trial Schedule. The only
5 edit, it's minor, it's in the third paragraph instead of
6 saying "After about 30 to 45-minute break for lunch," we'll
7 just say "After about a 45-minute break for lunch."

8 What I didn't see in these instructions is
9 anything about advising the jury about phasing or
10 bifurcation.

11 MR. SHORE: The University thinks the jury
12 should be informed about the bifurcated status of the case.
13 We think it could be potentially prejudicial to one or both
14 parties, depending on the jury's view, if they are wondering
15 why are we not being asked to do this, what normal jurors
16 think is done in a trial.

17 The way I would phrase that -- and I have seen
18 it phrased, although admittedly in State Court, was to
19 simply tell the jury the Court has divided this case into
20 two phases. The first phase, you know, being infringement
21 and the validity of the patent. And the second phase being
22 damages if you find the patent to be infringed invalid. It
23 doesn't need to be anything more than.

24 I also had a judge in Boston actually tell the
25 jury why it was bifurcated. Saying that there's certain

1 evidence that the Court did not want the jury to impact
2 their decisions on other issues and that evidence is going
3 to be separated and related to a second phase of the trial.

4 However you want to explain it to the jury, it's
5 your ruling. However you want to explain it to the jury, I
6 think those would be your words, it's your court and we'll
7 comment on them if we think it's something beyond the pale,
8 but I wouldn't expect it to be.

9 THE COURT: Okay.

10 MR. GROSS: Your Honor, David Gross. I just
11 wanted to mention this -- answer the question the Court just
12 asked on bifurcation and what to tell the jury.

13 And our thought, Your Honor, is what's most
14 important is that the jurors know they may have to be here
15 next week. So what would be bad is if the jury thinks if
16 there's a verdict on Friday, there's no possibility -- you
17 know, they are done. So most important that they know the
18 potential length of the overall trial will include certain
19 days, the next week. To me that -- to us, Your Honor,
20 that's actually, from the Court's perspective, most
21 important because if they think they're free and clear and
22 they are not, then we actually have a problem here.

23 THE COURT: Right. Right. Yeah, that's why --
24 that's the reason why I asked the question, because --

25 MR. GROSS: Exactly, Your Honor.

1 THE COURT: So if the Court just told them that
2 the matter has been -- is going to be -- has been separated
3 into two parts and that they will need to deliberate after
4 each part and leave it as that, as general as that, that way
5 they don't know what the effect of how they rule in the
6 first phase, how that affects the second phase. We'll leave
7 that to when we get to the instructions between the two
8 phases. I think that's a benign instruction and doesn't
9 prejudice either side.

10 MR. GROSS: Your Honor, if I may give a tiny bit
11 of pushback on how that's phrased, I just want to suggest
12 one thing to the Court.

13 I think as an Officer of the Court what's
14 important is they know they might be here next week, that's
15 -- in other words, are you available for these days? And
16 once we hear yes, we know they are available. I think
17 what's actually going to happen is we're going to have a
18 liability phase, we know that's going to happen, and we may
19 have a second phase.

20 The Court may make rulings, the jury may make a
21 ruling, there may not be a second phase, so I was only going
22 to suggest to the Court that we don't say, like, you will
23 have two phases, there's going to be a first phase and a
24 second phase, because they might not have a second phase.
25 So -- they might not.

1 So I would just suggest to the Court that we say
2 there's going to be a liability phase and there may be
3 another phase. And simply they understand that -- because
4 they may be thinking oh, so we're going to decide this and
5 then I'm going to be -- next week is going to be a second
6 phase and there may not be a second phase, Your Honor.
7 That's all I'm --

8 THE COURT: Yeah, but when you start parsing it
9 like that that gives one side some benefit that -- than the
10 other side.

11 So, again, I'm going to use -- I'll decide how I
12 do it, but I'm going to use language that is benign and that
13 ensures that the jury understands that it's two phases.

14 MR. GROSS: Understood. In other words, if
15 something -- if there's a certain -- we --

16 THE COURT: So if you guys want to meet and
17 confer and come up with some language that you both can
18 agree to, please do so and get it to me. If not, then I'll
19 come up with the language.

20 MR. GROSS: Understood, Your Honor. I think we
21 understand where the Court is coming from.

22 MR. SHORE: Obviously we do not want the jury
23 informed that they get to go home early if they find for the
24 defense. That's the primary reason why plaintiffs don't
25 like bifurcation, so if we could have a neutral, there's two

1 phases, the Court -- the case should last no longer than
2 through next Wednesday or whatever the day is, it will be in
3 two phases.

4 I also would like to say to the Court when we
5 see the outcome, the Court may want to have the second phase
6 irregardless of what happens in the first phase because if
7 we go up on appeal and you want to have the damages finding
8 in there anyway, because if there's some sort of reversal --
9 instead of reversal and remand, we can get a reversal and
10 render. So there's way too much that's unknown at this
11 point in time to tell the jury that you get to go home if
12 you find for the defendant.

13 THE COURT: All right. So with respect to any
14 proposed language that the parties agreed to, if the parties
15 could get that to the Court by the end of the day on this
16 coming Wednesday as well.

17 So next we're going to move to the final jury
18 instructions for phase one.

19 First dispute of substance is 1.12. And on page
20 14 with respect to the end of the second paragraph that's
21 started on page 13, with respect to the issue of
22 preponderance of the evidence. Again, that's plaintiff's
23 language that we're -- that tracks the standard slightly on
24 will be used.

25 With respect to the disagreement about clear and

1 convincing evidence, I didn't accept either's proposed
2 insertion. Instead that paragraph will read: In addition
3 to denying plaintiffs', UTBOR and TissueGen, claims that it
4 infringes Boston Scientific asserts that the asserted claims
5 of the '296 patent are invalid. The party challenging the
6 validity of a patent, in this instance Boston Scientific,
7 has the burden to prove that the asserted claims are invalid
8 by clear and convincing evidence. "Clear and convincing
9 evidence" means evidence that is highly probable that a fact
10 is true. Proof by clear and convincing evidence is a higher
11 burden than proof by a preponderance of the evidence.

12 And then we'll pick up with: You may have heard
13 of the beyond a reasonable doubt burden of proof on page 17.

14 Moving to -- 2.1 is just the designation sort of
15 issue, sort of substance there.

16 2.2 the substantive dispute deals with question
17 number 2. So that is pursuant to the Court's bifurcation
18 order that's something that should -- is going to be decided
19 in phase two.

20 With respect to question two in phase one, it
21 will be whether plaintiffs, UTBOR and TissueGen, have proven
22 by a preponderance of the evidence that -- and here's a
23 question that I have for UT. Who the third parties are that
24 UT will be showing infringed?

25 MR. SHORE: The active infringement is by the

1 hospitals who sell them to patients within their place and
2 physicians who use them to place them within patients, so
3 it's a sale and a use inducement.

4 I will tell you that we are considering and very
5 well may and will make our decision this -- early next week,
6 by next Wednesday, we may drop the inducement claim
7 entirely.

8 THE COURT: Okay.

9 MR. SHORE: And the other third party is Boston
10 Scientific Limited.

11 THE COURT: Right. So the way I drafted it,
12 question number two, is: Whether plaintiffs', UTBOR or
13 TissueGen, have proven by a preponderance of the evidence
14 that physicians, Boston Scientific Limited, a BSC
15 subsidiary, or other third parties directly infringe one or
16 more of claims 1, 11, 12, 17 and 26 of the '296 patent."
17 But I just didn't know who those third parties are.

18 MR. SHORE: You can drop everything out of that
19 for sure except Boston Scientific Limited. And we may drop
20 that one as well, but we'll let you know by next week.

21 THE COURT: So I can just say Boston Scientific
22 Limited?

23 MR. SHORE: Right.

24 THE COURT: Okay. So I can drop physicians and
25 other third parties?

1 MR. SHORE: Yes.

2 THE COURT: All right. So that will be question
3 two.

4 And then question three will be -- is already
5 there, so there's no dispute about that.

6 Moving to 3.2, there's a dispute about fiber in
7 the construction there. And the Court's construction was
8 and is: This term shall have its plain and ordinary meaning
9 to a person of ordinary skill in the art, which is a
10 thread-like structure of any length or shape.

11 With respect to the dispute concerning the first
12 and second phases being admissible, that's going to come
13 out. I agree with Boston Scientific that can come out.

14 With respect to instructions 3.3 and 3.4, the
15 Court came up with its revised instruction.

16 Did you pass that out, Joe?

17 Okay. So infringement generally -- well, you
18 guys have it, you can read. Either side have anything with
19 respect to 3.3 or 3.4 that they want to discuss?

20 We got these instructions from sort of combining
21 the parties' proposals and also borrowing from the
22 instruction that Judge Noreika used in the *Complete Genomics*
23 case.

24 MR. DROWN: Your Honor, on instruction 3.1 just
25 seeing it today -- sorry 3.3, we can look at it closer and

1 have further comments, if we do. But one thing we thought
2 might be helpful, I don't -- just quickly looking back, it
3 might be helpful in the last sentence of the first paragraph
4 to say: Must determine whether UT and TissueGen have proven
5 literal infringement of... and then identify which claims
6 are independent and which ones are dependent, because then
7 it goes on to explain the issue of dependent and independent
8 claims, just so it's clear right there which ones are
9 independent. And I think it's -- claim 1 is the only
10 independent claim and the other ones are dependent. If we
11 could just insert that there.

12 THE COURT: What's your response to that?

13 MR. SHORE: I would say TissueGen had proven
14 literal infringe of independent claim 1 and dependent claims
15 11, 17 and 26.

16 THE COURT: Okay.

17 MR. SHORE: And then later when you explain what
18 independent and dependant means, I think that clears it up.

19 MR. DROWN: And then finishing that sentence, it
20 would be dependant claim 12.

21 THE COURT: Okay. We'll incorporate those
22 additions, that sounds like both sides agree to now.

23 All right. Anything else on -- that takes care
24 of 3.3.

25 Anything with respect to 3.4?

1 MR. SHORE: Your Honor, I just want to make it
2 clear, and I think I could speak for both sides, we're not
3 waiving any objections later to the charge conference, but
4 sitting here today, informing the Court what I think appears
5 to be acceptable edits.

6 THE COURT: Okay.

7 All right.

8 MR. DROWN: Not right now, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. SHORE: I would have one thing -- I'm sorry.
11 I think it is a little bit confusing to use the word
12 "elements" for both things that are in the patent and
13 "features" that are not.

14 So what I would put is: However, the presence
15 of other features in the accused products beyond the
16 elements claimed in the patent does not avoid infringement
17 as long as every claimed element is there.

18 Because what is not an element -- what is not a
19 claim element, I don't believe should be referred to as an
20 "element," I think that's a little bit confusing.

21 And you could call it features or attributes or
22 whatever you want to, but I would prefer not to have the
23 word "element" used for things that are not in the patent.

24 THE COURT: Yeah, I'm fine with that.

25 Are you fine with that change?

1 MR. DROWN: That's fine, Your Honor.

2 THE COURT: Okay.

3 All right. Next moving to instruction 4.1

4 Invalidity/Burden of Proof. We'll accept the first

5 sentence. And then with respect to the parties' dispute

6 concerning the clear and convincing evidence issue, we're

7 going to use the same language that we used in 1.12. And so

8 that paragraph will read: A party challenging the

9 invalidity of a patent, in this instance Boston Scientific,

10 has the burden to prove that the asserted claims are invalid

11 by clear and convincing evidence. "Clear and convincing

12 evidence" means evidence that is highly probable that a fact

13 is true. Proof by clear and convincing evidence is a higher

14 burden than proof by a preponderance of the evidence.

15 MR. SHORE: I just want to make sure that wasn't

16 a scrivener's error where "preponderance" was written on this

17 page. I now understand the ...

18 THE COURT: Okay. So, next 4.2. There's a

19 dispute concerning the level of education and experience

20 with respect to a person of ordinary skill in the art and

21 what the jury should consider.

22 Boston Scientific proposed three additional

23 factors that are found in some instructions in Northern

24 District of California's model patent jury instruction, and

25 we're going to accept Boston Scientific's proposal there.

1 And it will be five factors.

2 Next is 4.3, Invalidity/Prior Art. For that,
3 we're going to accept plaintiff's proposal there.

4 4.4, there's no dispute there.

5 Next 4.5, the first dispute appears in the
6 second paragraph, plaintiffs proposed "in the field of
7 invention." Boston Scientific proposed "in the field of
8 biodegradable polymer fibers." And the Court is going to go
9 with "in the field of invention."

10 The next paragraph, third paragraph, that last
11 sentence, that last phrase will say: "So-called objective
12 evidence or secondary considerations, which I will describe
13 shortly."

14 So with respect to the plaintiffs' proposed
15 insertion on page 40 with respect to the indicia of
16 nonobviousness, secondary considerations, let's have UT
17 identify the objective indicia of nonobvious on which UT
18 will present evidence, and eliminate from the list any of
19 which -- on which UT will not present evidence.

20 MR. SHORE: When would you like that done, Your
21 Honor? Keep it to the Wednesday close of business
22 timeframe?

23 THE COURT: Yeah. I mean, I can read them all,
24 but I just think if you're not going to present evidence on
25 some of them, then, you know, what's --

1 MR. SHORE: Some of these will be presented
2 through cross-examination.

3 THE COURT: Okay. We'll leave it all then.

4 MR. DROWN: Your Honor, this is -- the issue
5 that we talked about with respect to bifurcation where we
6 asked them what secondary considerations are you relying on
7 and they only said teaching away. Teaching away literally
8 isn't even on this list because it is not a secondary
9 consideration. They disclosed no secondary consideration.

10 So what we propose, Your Honor, consistent with
11 the letter briefing, is in that letter briefing they
12 identify where they disclosed in discovery the secondary
13 considerations they would be relying on. And if they didn't
14 disclose any, we will respond on -- they'll do that on
15 Tuesday, we'll respond on Wednesday.

16 And we think if they didn't disclose any, they
17 don't get a secondary considerations jury instruction
18 because that's the law.

19 MR. SHORE: Your Honor, we'll do that. But I
20 would point out again this is a rebuttal case --

21 THE COURT: Yeah, I understand. I'll rule.
22 I'll rule. Yeah, this is subject to the additional
23 briefing.

24 So if I rule it stays, we're going to leave the
25 whole list; if I rule that it comes out, it goes to that --

1 this is something that comes out and it will come out.

2 MR. SHORE: And I'd also point out, Your Honor,
3 after we present that first half of the case, both of us,
4 through direct and cross, if anything is not supported, it
5 won't get submitted to the jury. So, you know, we totally
6 understand that.

7 THE COURT: Okay. 4.6 in the first paragraph,
8 the second sentence we're going to go with Boston
9 Scientific's proposal that the inventor actually invented
10 the claimed subject matter. And then we'll pick up with the
11 undisputed.

12 MR. SHORE: Your Honor, the only thing we would
13 ask on that is the word "actually" be eliminated there. It
14 adds nothing other than a point of emphasis that is
15 unnecessary to the issue for the jury.

16 It should be whether the inventor invented the
17 subject matter.

18 THE COURT: All right. The Court is fine with
19 that edit.

20 In the second paragraph, we're going to go
21 with -- we'll start it with: To succeed... which Boston
22 Scientific proposed.

23 Then in the fourth paragraph on page 43, which
24 starts with the written description, we will -- the Court
25 accepts the plaintiffs' insertion there.

1 And on page 44, the proposed insertion at the
2 end, Boston Scientific, is not accepted.

3 Moving to 5.5, the Court has no opinion. All
4 the Court is going to read is the first paragraph;
5 plaintiffs' proposed insertion is not accepted.

6 So that completes the final jury instructions
7 for phase one.

8 Next we'll go to the proposed verdict form for
9 phase one.

10 Question number one will read: Did UTBOR and
11 TissueGen prove by a preponderance of the evidence that
12 Boston Scientific's Synergy stents infringe any of the
13 following claims of the '296 patent?

14 Yes is a finding in favor of UTBOR and
15 TissueGen; no is a finding in favor of Boston Scientific.
16 And the claims will be listed. The jurors answer yes or no.

17 Question two will be: Did plaintiffs, UTBOR and
18 TissueGen, prove by a preponderance of the evidence that
19 Boston Scientific Limited, a BSC subsidiary, directly
20 infringed one or more of claims 1, 11, 12, 17 and 26 of the
21 '296 patent?

22 And again those claims will be listed. Yes is a
23 finding of UTBOR and TissueGen; no is a finding in favor of
24 Boston Scientific.

25 Yes?

1 MR. SHORE: So my only concern here, Your Honor,
2 is stents don't infringe. Stents may be covered by the
3 patented claims, but the act of infringement is selling,
4 offering to sell, importing, etc. So Boston Scientific
5 infringes, stents don't infringe. Stents may be covered by
6 the claims of the patent, but the actions of infringement
7 are actions of Boston Scientific. A stent doesn't sell
8 itself or import itself or whatever.

9 THE COURT: So you're going back to question
10 one?

11 MR. SHORE: I'm going back to question one in
12 that I just think that that is --

13 THE COURT: So your proposed amendment is that
14 evidence that Boston Scientific infringed?

15 MR. SHORE: Correct.

16 THE COURT: Okay.

17 MR. SHORE: I don't want the jury to be confused
18 that a stent -- if a stent is covered by the claims, it may
19 not infringe. A stent doesn't infringe until it is
20 imported, sold, offered to sell, used, etc.

21 THE COURT: You'll have the opportunity to
22 explain what you mean by infringe in your arguments, your
23 closing argument, your opening argument, etc.

24 What's your response to just making it Boston
25 Scientific infringed?

1 MR. DROWN: I think we can reflect on that
2 issue, Your Honor.

3 I think that bigger issue we have with this
4 overall verdict form is question two. This first phase is
5 supposed to be about direct infringement. Do these stents
6 meet all the limitations of the claim.

7 The second question that they've imposed relates
8 to inducement. And all this is getting at, Your Honor, is
9 for inducement, a third party has to commit an act, such as
10 the use of a stent or the sale of a stent. The third party
11 has to commit the directly infringing act. That's all this
12 is trying to get at.

13 We think it's not appropriate for the first
14 phase, because the first phase is literally does this stent
15 have all the limitations. If it does, then in the second
16 phase they can prove that Boston Scientific with knowledge
17 and intent committed acts to cause third parties to directly
18 infringe; meaning, to cause third parties to use it, to
19 cause third parties to sell it.

20 THE COURT: Well, the term "infringement" in
21 phrase one of the third parties, whether or not the third
22 parties infringed. So, I mean, will Boston Scientific
23 stipulate to third party direct infringement if the jury
24 finds that Boston Scientific directly infringed?

25 MR. DROWN: Well, the issue is does the stent

1 have all the limitations, that's the direct infringement
2 question.

3 Boston Scientific sells the stents, so
4 obviously... But the question for direct infringement is do
5 they have all the limitations. To then ask do third parties
6 use them and that's how they infringe, that's not part of
7 a -- that's an inducement question. Because if you're going
8 to -- because here's the thing, Your Honor, is what's
9 confusing about this verdict form is we have the first
10 question, if the answer is "no" to the first question, there
11 must be an instruction that says do not answer the second
12 question, or you must answer "no" to the second question
13 because if they don't -- if they answer "no" to the first
14 question, they have to answer "no" to the second question,
15 because that means the Synergy stent does have all of the
16 limitations. And if we don't have an instruction -- if
17 we're going to add this second question in the first phase,
18 it's incredibly confusing not to have an instruction of
19 either if you answer "no" to question one skip question two
20 and answer question three.

21 THE COURT: Okay.

22 MR. DROWN: Or you must answer "no" to question
23 two.

24 But we don't think this should be in the first
25 phase at all because it adds confusion. It adds nothing to

1 the case, which is why they're probably going to drop it,
2 but it should be skip question two or you must answer "no"
3 to question two if you answer "no" to question one.

4 THE COURT: Okay.

5 MR. SHORE: Okay. Thirty-two years, a new one.
6 Now he wants to trifurcate the case. So whether or not the
7 stents or the accused products practice the claims of the
8 patent is an element of infringement, but it is not
9 infringement. Infringement is the act of buying, selling,
10 importing, whatever.

11 So the way this should be done, I believe, is
12 ask whether or not Boston Scientific infringed, and they
13 know to infringe the Synergy stents have to practice the
14 claims because those are the accused products. But they
15 also -- they can sell. And you actually could have a
16 situation where Boston Scientific doesn't infringe, but they
17 induce others to infringe, because if the product practices
18 the claim and Boston Scientific doesn't sell in the United
19 States, offer to sell in the United States, etc., but they
20 induce someone else to take those actions, then you can have
21 an inducement without infringement by Boston Scientific.

22 So unless we're going to trifurcate this, the
23 way this should be is did Boston Scientific infringe and
24 then the second one is did Boston Scientific -- you know,
25 get others or induce others.

1 And like I said, we can drop out physicians and
2 we can drop out other third parties and just say Boston
3 Scientific Limited, you know, did they induce Boston
4 Scientific Limited. But the idea that we are first going --

5 THE COURT: Well, inducement, we're not --
6 inducement is phase two.

7 MR. SHORE: Well, I'm talking about that they
8 took actions or -- I'm trying to read the Court's language
9 here.

10 Did plaintiffs prove by a preponderance of the
11 evidence that Boston Scientific Limited directly infringed
12 one or more claims? So that would be the second question.

13 THE COURT: Right.

14 MR. SHORE: That's infringement, that's phase
15 one.

16 THE COURT: All right.

17 Okay. But you were saying inducement, which I
18 know is phase --

19 MR. SHORE: I'm sorry, it's whether -- unless
20 they directly infringe, they never get to inducement.

21 THE COURT: Okay. So the Court will keep
22 question two the way it is.

23 Question one we'll change to evidence that
24 Boston Scientific infringed any of the claims of the '296
25 patent.

1 Question two will be as the Court read.

2 And then this question -- plaintiffs' question
3 number three, Boston Scientific's question number two will
4 be the third question.

5 Did Boston Scientific prove by clear and
6 convincing evidence any of the following claims of the '296
7 patent are invalid.

8 MR. DROWN: Your Honor, if I may?

9 I just want to make sure -- be very clear about
10 this. There is a claim for direct infringement against
11 Boston Scientific Corporation, that is question one.

12 There is a claim for indirect infringement by
13 inducement against Boston Scientific Corporation. The way
14 indirect infringement works is Boston Scientific is alleged
15 to be the indirect infringer by inducing a third party to
16 directly infringe. And that second question that you have
17 on the verdict form is about indirect infringement. Because
18 in order for them to prove indirect infringement, they have
19 to prove that Boston Scientific did something that caused a
20 third party to --

21 THE COURT: To directly infringe.

22 MR. DROWN: To directly infringe.

23 THE COURT: Right.

24 MR. DROWN: So the second question is an
25 indirect infringement question.

1 And we don't think it should be in the first
2 phase, because it's confusing to have it in the first phase.
3 Because if the jury finds no infringement, no direct
4 infringement on question one by Boston Scientific
5 Corporation, there can be no direct infringement by a third
6 party for inducement because the product doesn't have all
7 the limitations.

8 The argument from counsel that well, there could
9 be a situation where Boston Scientific doesn't sell the
10 product, but they are liable for indirect infringement,
11 that's never been the case in this case. Boston Scientific
12 is making and selling the Synergy stent. The question for
13 question one is simply direct infringement; meaning does the
14 Synergy stent technically have all the limitations of the
15 asserted claims. And if the answer to that is "no," the
16 answer to question two has to be "no" as well.

17 THE COURT: Okay. So -- all right. Well, the
18 Court will take that under advisement and --

19 MR. DROWN: Thank you, Your Honor.

20 THE COURT: -- give it further consideration.

21 MR. SHORE: Do you want to hear anything else
22 from me, Your Honor?

23 THE COURT: You can respond.

24 MR. SHORE: What he said was just technically
25 incorrect. Whether the elements are present is an element

1 of infringement. It is not infringement. And we -- and so
2 you can have the question of whether both of those Boston
3 Scientific entities infringe belongs in claim 1 -- I mean,
4 in phase one.

5 And irregardless of whether they say one does or
6 the other does or both do, you would go to phase two because
7 if one of them infringes, there's damages. And whether or
8 not they're induced that can come in in phase two, but you
9 have to show infringement in phase one. We can't go to
10 phase two to prove inducement and infringement.

11 THE COURT: Understood.

12 All right. So next we have the preliminary jury
13 instructions, phase two.

14 First dispute is in instruction number 1, the
15 Introduction. Looks like plaintiff tracked largely from the
16 instruction used by Judge Connolly in the *Magnolia* case, and
17 Boston Scientific proposed to add some stuff to it.

18 We're going to go with the plaintiffs' proposed
19 there with some edits in that last sentence that will read:
20 For Boston Scientific's infringement, which you found during
21 the first phase of the case.

22 Moving to instruction 3, the substantive dispute
23 had to do with preponderance of the evidence and, again,
24 slightly on. So that takes care of those instructions.

25 Moving to the final jury instructions, phase

1 two. The 1.2 issues presented in phase two, in number 2,
2 that's going to read: Whether plaintiffs, UTBOR and
3 TissueGen, have proven by a preponderance of the evidence
4 that Boston Scientific induced infringement by others.

5 So there we're accepting Boston Scientific's
6 proposed language.

7 MR. SHORE: Your Honor, the only thing we would
8 say -- I'm sorry, I shouldn't talk before I get to the
9 microphone. We would -- instead of "others," we would say
10 the other Boston Scientific entity. That's the only other
11 thing there is.

12 THE COURT: Okay. So you want to say --

13 MR. SHORE: Boston Scientific Limited.

14 THE COURT: Okay.

15 All right. Three and four proposed by
16 plaintiffs are no's, we're not going to go with those.

17 So number three will be whether plaintiffs,
18 UTBOR and TissueGen, have proven by a preponderance of the
19 evidence the amount of money damages adequate to compensate
20 them for Boston Scientific's infringement.

21 Moving on to 1.3, Burdens of Proof. Again, the
22 preponderance of the evidence is slightly -- tips slightly
23 to their side in each instance.

24 Moving to instruction number 2, Willful
25 Infringement. Boston Scientific's proposal is most

1 appropriate.

2 With respect to number 3, instruction number 3,
3 Induced Infringement, this is going to depend upon the
4 Court's decision, but this one is going to have to be
5 revised.

6 MR. SHORE: This goes back, again, to the Boston
7 Scientific Limited issue, where we just allege inducement by
8 their subsidiary.

9 THE COURT: Right. Yeah, this one is going to
10 have to be revised after the Court issues its ruling with
11 respect to the briefing, then the parties should meet and
12 confer about this one and submit a -- hopefully a jointly
13 revised one, but whatever issues remain, the Court will
14 consider.

15 Moving to 4.1, Damages Generally. The first
16 paragraph, the second sentence will include the proposal by
17 Boston Scientific by instructing you on damages. I am not
18 suggesting which party should win this case on any issue.

19 MR. SHORE: The only thing we'd raise there,
20 Your Honor, is in a bifurcated case, I'm not really sure
21 that sentence is necessary because there's already been a
22 decision that if they reach this that the University has won
23 the case on infringement and validity. So maybe the way to
24 do it is by instructing you on damages, I'm not suggesting
25 any particular amount of damages, if any, should be awarded.

1 THE COURT: No, we're going to keep it the way
2 it is.

3 MR. SHORE: Okay.

4 THE COURT: 4.2. The dispute had to do with the
5 last sentence that Boston Scientific proposed, and we're not
6 going to include that sentence.

7 Same in 4.3, not going to include that last
8 sentence.

9 4.4, that's just about designation.

10 So 4.6, next, and that will stop after the
11 sentence: "An acceptable alternative must be a product
12 that's licensed under the patent or that does not infringe
13 the patent." And that's where we'll cut that off.

14 4.7, the Court revised 4.7, it passed out a copy
15 of the Court's proposed revision.

16 You don't have to tell me your thoughts now, but
17 the parties can get back to the Court by end of the day next
18 Wednesday as to any comments with regard to this. Just meet
19 and confer about this and see if you can come to an
20 agreement. And the UT will be the UTBOR, I understand.

21 That completes the final jury instructions for
22 phase two.

23 Next we have the proposed verdict form for phase
24 two. And it was easier for the Court to work from Boston
25 Scientific's proposed verdict form. So question one will

1 read: Did UTBOR and TissueGen prove by a preponderance of
2 the evidence that Boston Scientific induced infringement of
3 any of the following claims of the '296 patent? "Yes" is a
4 finding in favor of UTBOR and Boston Scientific; "no" is a
5 finding in favor of Boston Scientific -- I mean, "yes" is a
6 finding in favor of UTBOR and TissueGen; "no" is a finding
7 in favor of Boston Scientific.

8 Question two: Did you UTBOR and TissueGen prove
9 by a preponderance of the evidence that Boston Scientific's
10 infringement of any of the claims of the '296 patent was
11 willful? "Yes" is a finding of favor of UTBOR and
12 TissueGen; "no" is a finding in favor of Boston Scientific.

13 Question three, it will be: Did UTBOR and
14 TissueGen prove by a preponderance of the evidence that
15 UTBOR made reasonable efforts to ensure that TissueGen
16 complied with marketing requirements? "Yes" is a finding in
17 favor of UTBOR and TissueGen; "no" is a finding in favor of
18 Boston Scientific.

19 Question four, will be: Did UTBOR and TissueGen
20 prove by a preponderance of the evidence that they complied
21 with the marketing requirement? "Yes" is a finding in favor
22 of UTBOR and TissueGen; "no" is a finding in favor of Boston
23 Scientific.

24 Question five will be: Did UTBOR and TissueGen
25 prove by a preponderance of the evidence that they gave

1 Boston Scientific actual notice of infringement before the
2 filing of this lawsuit on November 20, 2017? "Yes" is a
3 finding in favor of UTBOR and TissueGen; "no" is a finding
4 in favor of Boston Scientific.

5 And "yes" if the actual date of infringement
6 was. "No."

7 Question number six: What amount of damages
8 have the -- what amount of the damages have UTBOR and
9 TissueGen proven by a preponderance of the evidence that
10 they're entitled to as a reasonable royalty for Boston
11 Scientific's infringement of the '296 patent?

12 All right.

13 MR. SHORE: The only real issue I have is
14 there's a dispute in the case whether the marking
15 requirement was even triggered. And so that issue I think
16 is the correct issue for the jury. If the marking
17 requirement was triggered, then it's undisputed that there
18 was no marking of any products that predate.

19 So that's really -- when you say did they
20 enforce the marking requirement or did they take reasonable
21 efforts, we don't believe there was any reasonable efforts
22 necessary because there was never a public sale, there was
23 never -- the marking requirement was never triggered. And
24 so that I think is the real question for the jury is whether
25 a marking requirement ever arose at all.

1 And the way this reads: Did they prove that
2 they made reasonable efforts to ensure that TissueGen
3 complied? There was no compliance required according to the
4 University and TissueGen because the only thing that was
5 done was there was some samples that were sent out in their
6 confidentiality agreements, it was never a public sale, etc.

7 THE COURT: The language I used came from your
8 proposed question, so I took your question.

9 MR. SHORE: Yeah, I know. And unfortunately for
10 me, I don't think that's right. And so what -- it may be a
11 slight difference, but it's a major difference; in that, if
12 there's no marking requirement that's triggered, then there
13 is no diligence that's required to ensure people mark. I
14 mean the diligence is did UTBOR enforce the marking
15 requirement when it was required.

16 THE COURT: But, see, you're trying to -- you're
17 making a legal argument about whether marking was triggered
18 that you haven't teed up anywhere else.

19 MR. SHORE: That is absolutely correct. And
20 factually -- and I think this is part of the motion in
21 limine, which we'll get to later, but factually to us it's
22 pretty much undisputed there were no public sales. And they
23 didn't identify any public sales under *Arctic Cat*, so maybe
24 this is something we do at the charge conference saying this
25 shouldn't be submitted at all because they never identified

1 any specific products under *Arctic Cat*, and it's undisputed
2 that there were no public sales. I don't understand why
3 marking is even here.

4 But the issue is whether a marking requirement
5 ever triggered. And there was no triggering of a marking
6 requirement because what triggers a marking is a public
7 sale.

8 THE COURT: Well, again, I used the language
9 from your proposed instruction.

10 MR. SHORE: Sometimes we make mistakes.

11 THE COURT: If you want to confer with opposing
12 side, this is phase two verdict form, something changes, you
13 know, parties are free to meet and confer --

14 MR. SHORE: Thank you.

15 THE COURT: About things.

16 MR. SHORE: We'll do that.

17 THE COURT: All right.

18 MR. DROWN: Your Honor, I think for all of
19 these, including all of the phase two instructions and the
20 verdict form, obviously I think Your Honor is intending that
21 we'll have a formal opportunity to object to the
22 instructions on the record and suggest changes. And I think
23 we should do it that way as opposed to quickly reacting
24 today to them, if that's fair, Your Honor. We could do that
25 Wednesday or Thursday of next week with the objections as

1 opposed to individual times.

2 MR. SHORE: We will meet and confer and get back
3 to you, Your Honor, how about that?

4 MR. DROWN: I wasn't --

5 THE COURT: Yeah, just meet and confer, but I
6 think -- I mean, the verdict form is -- the things that
7 we've talked about is what the Court is going to do unless
8 you guys agree to something else.

9 MR. DROWN: Understood. We just want to make
10 sure for purposes of appeal that we have --

11 THE COURT: Yeah, you'll have your time. You
12 can do that.

13 MR. DROWN: If they want to remove question
14 three, we didn't propose it, so they can remove question
15 three on the second phase of the verdict form.

16 THE COURT: Right. I understand. All right.

17 All right. So that takes care of the verdict
18 sheet in phase two.

19 Next we're going to move to the motions in
20 limine.

21 So with respect to everything except the voir
22 dire, the parties should incorporate the revisions that the
23 Court has provided, and anything that you guys agree to
24 between now and next Thursday, and then resubmit those
25 documents to the Court by the end of the day on next

1 Thursday.

2 An electronic version should be send to the
3 Court's e-mail as well as Mr. Liss's e-mail, Word versions
4 so they can be manipulated.

5 All right. So moving to the motions in limine.
6 First, going to UT's motion in limine. UT's motion in
7 limine number one seeking to exclude unrelated -- allegedly
8 unrelated settlements and disputes is denied.

9 UT's arguments go to the weight of the evidence.
10 UT can challenge the weight given to such agreements and the
11 hypothetical negotiation framework during its
12 cross-examination.

13 Going to UT's motion in limine number two,
14 seeking to exclude alleged irrelevant clinical evidence.
15 That motion is denied.

16 Federal Rule of Evidence 402 permits omission
17 only of relevant evidence. While Rule 403 provides the
18 Court may exclude relevant evidence if its probative value
19 is substantially outweighed by danger of unfair prejudice,
20 confusing the issues or misleading the jury.

21 Here, UT's damages case is that the patented
22 invention offered and anticipating clinical benefit to
23 patients at the time of the invention -- and Boston
24 Scientific marketed its stent accordingly. Boston
25 Scientific's expert opines that, "There has never been a

1 significant clinical benefit proven by clinical trials for
2 utilizing a drug-eluting stent with a bioabsorbable polymer
3 compared to a durable one.

4 That opinion clearly relates to the time of the
5 hypothetical negotiation and is not unfairly prejudicial.

6 Also, UT has failed to identify unfairly
7 prejudicial evidence it seeks to exclude that is actually
8 based on the alleged 2018 clinical trials.

9 Moving on to UT's motion in limine number three.
10 Seeking to exclude alleged pre-*Markman* evidence, that motion
11 is granted in part, denied in part.

12 UT's motion in limine presents three issues, the
13 first deals with "miscible." The parties agree to construe
14 "miscible as "Incapable of dissolving into one another."

15 And construed "first phase" as "The polymer
16 portion of the fiber."

17 And "second phase" as "The discrete drug
18 containing regions dispersed throughout the fiber."

19 In its October 6th memorandum order, the Court
20 explained that Boston Scientific understood when it agreed
21 to the construction of "miscible," that miscible referred to
22 phases rather than substances.

23 The Court will not allow Boston Scientific to
24 change the object of the miscible inquiry.

25 In a footnote, the Court dismissed Boston

1 Scientific's attempt to equate phases and substances
2 because, one, the attempt was made for the first time in
3 Boston Scientific's reply brief. And, two, UT disputes as a
4 factual matter that the miscibility of PLGA, the polymer,
5 and everolimus, the drug, results in the admissibility of
6 the phases that contain PLGA and everolimus.

7 The Court excludes Boston Scientific's expert
8 testimony to the extent Boston Scientific's expert attempts
9 to testify that the miscibility of PLGA and everolimus is
10 inconsistent with the claimed term since Boston Scientific
11 agreed to a construction of miscible based on phases.

12 However, the Court does not exclude Boston
13 Scientific's expert's testimony to the extent the expert
14 asserts that the miscibility of PLGA and everolimus causes
15 the PLGA rich and everolimus rich phases to be miscible.
16 Such an argument is consistent with the parties' agreed upon
17 construction of miscible.

18 With respect to fiber. On November 17th, the
19 Court construed "fiber" as taking its plain and ordinary
20 meaning to a person of ordinary skill in the art, which is
21 "A thread-like structure of any length or shape."

22 The Court explained that Boston Scientific may
23 not argue that the fiber recited in claim 1 must have a
24 common molecular orientation. During the *Markman* hearing on
25 November 7th, Boston Scientific stated that: "We're not

1 saying the method of manufacturing in of itself is a
2 limitation."

3 Boston Scientific agrees that it will not argue
4 that a fiber must have a common molecular orientation.

5 Further, Boston Scientific has maintained
6 multiple times before this court that it does not claim that
7 the method of manufacturing limits claim 1. Thus, the Court
8 grants UT's motion to the extent that Boston Scientific
9 argues where its experts assert that either fibers must have
10 a common molecular orientation or that claim 1 is limited by
11 a method of manufacturing.

12 Boston Scientific may argue that the accused
13 products manufacturing process causes its polymer coating
14 not to form a thread-like structure.

15 With respect to the impeachment of Dr. Pitt, the
16 Court agrees with Boston Scientific that Boston Scientific
17 may impeach Dr. Pitt with its prior expert opinions.

18 Dr. Pitt may, of course, respond to such
19 questions by explaining that certain opinions were given
20 prior to the Court's claim construction order.

21 If Boston Scientific raises an opinion from
22 Dr. Pitt to which this impeachment defense applies, the
23 Court -- Dr. Pitt should be given an opportunity to explain
24 the reason for his changing opinions, so it will be more
25 than a yes/no response.

1 Moving to Boston Scientific's motions in limine.
2 Boston Scientific's motion in limine number one is denied,
3 subject to parameters that I will detail.

4 On November 17th, the Court construed "fiber" as
5 taking its plain and ordinary meaning to a person of
6 ordinary skill in the art, which is "A thread-like structure
7 of any length or shape."

8 Boston Scientific argues that Dr. Pitt's
9 feelings were neither justified nor harmless -- well, let me
10 start here. Boston Scientific seeks to preclude Dr. Pitt
11 from testifying at trial that the coding applied to Boston
12 Scientific's accused Synergy stent as thread-like. Whether
13 the coating is thread-like was at issue before the Court's
14 claim construction because Dr. Pitt opined in a prior case
15 the *Ethicon* case, that fiber as used in the '296 patent
16 means thread-like. And because Boston Scientific's expert,
17 Dr. Mooney, opined that the accused products here do not
18 infringe because their coating is not thread-like.

19 In Dr. Pitt's supplemental infringement report
20 and declaration in opposition to Boston Scientific's summary
21 judgment, again failed to discuss the issue. Boston
22 Scientific argues that Dr. Pitt's feelings were neither
23 justified nor harmless under the *Pennypack* factors because
24 Boston Scientific would be significantly prejudiced by new
25 thread-like opinions at trial, and there's no possibility to

1 cure the prejudice. And Dr. Pitt's choice to omit testimony
2 about thread-like was strategic.

3 Boston Scientific adds that Dr. Pitt's reports
4 never in any form assert that coating of the Synergy stents
5 is thread-like or that "stents" included polymer strips.

6 UT argues that Dr. Pitt's expert report fairly
7 notified Boston Scientific of Dr. Pitt's opinion that
8 Synergy stents include ultra thin, serpentine, drug-loaded
9 polymer strips that are fibers which are thread-like
10 structure of any length or shape.

11 UT asserts that Dr. Pitt's April 1, 2022 report
12 provided his opinions that the accused Synergy stent is
13 coated with fibers, in view of the Court's constructions and
14 confirmed that certain stent specimens have polymer strips
15 that conform to the serpentine path of the underlined stent
16 rings.

17 UT also notes that the Court's construction of
18 "fiber" occurred after the close of expert reports. In the
19 original *Markman* hearing, Judge Noreika explained that the
20 real dispute is not over whether a fiber is thread-like, as
21 in defendant's proposed construction, but rather whether the
22 term "fiber" can encompass what the defendants say is
23 coating.

24 Under Federal Rule of Civil Procedure
25 26(a)(2)(b)(i), expert reports must contain a complete

1 statement of all opinions the witness will express and the
2 basis and reason for them.

3 Under Rule 37(c)(1), a party may not use
4 information or a witness at a trial if the party failed to
5 provide such information consistent with Rule 26(a) unless
6 the failure was substantially justified or is harmless.

7 The Third Circuit applies the *Pennypack* factors
8 to determine if a failure was substantially justified or
9 harmless. One, the prejudice or surprise in fact of the
10 party against whom the evidence would have been presented;
11 two, the ability of that party to cure the prejudice; three,
12 the extent to which the presentation of the evidence would
13 disrupt the orderly and efficient trial of the case; and,
14 four, bad-faith or willfulness in failing to comply with the
15 Court's order; and, five, the importance of the excluded
16 evidence.

17 In its June 14, 2022 summary judgment briefing,
18 Boston Scientific asserted that a polymer fiber is a
19 thread-like or filamentous polymer structure that at least
20 includes common orientation of the polymer molecules.

21 While the Court found that a genuine dispute of
22 material fact would remain even if the Court adopted Boston
23 Scientific's proposed claim construction, the Court did not
24 find any reference to a thread-like structure in the
25 relevant section of Dr. Pitt's declaration submitted in

1 response to the summary judgment motion.

2 On October 18, 2022, Dr. Pitt submitted a
3 supplemental declaration, but UT points to no opinion from
4 Dr. Pitt that anywhere asserts that the fibers which coat
5 the accused Synergy stent are thread-like.

6 Instead, UT argues that Dr. Pitt's report fairly
7 notifies the defendant of Dr. Pitt's opinion that Synergy
8 stents include ultra thin, serpentine drug-loaded polymer
9 strips that are fibers, which are thread-like structures of
10 any length or shape within the scope of the asserted patent.

11 UT points to D.I. 249-9 at 61, and at page 70,
12 note five and page 76, note 10, paragraphs 28 to 35 as
13 examples of opinions that should have alerted Boston
14 Scientific to Dr. Pitt's opinion that the fiber coating --
15 that the fibers coating the stents were thread-like.

16 Therein, Pitt opined that Boston Scientific's
17 use of the words "filaments, fibers, wires and ribbons" in a
18 patent application appear to be consistent with the words
19 that are used in-house at Boston Scientific to describe the
20 fibrous pattern disposed on the luminal surface of the
21 Synergy stents.

22 Dr. Pitt also opined that on the "outer surface
23 of the stent," there is a "continuous length of fiber," that
24 "formed on" the serpentine column of the Synergy stent."

25 Pitt further opined that the accused products

1 included an ultra thin bioabsorbable polymer, that the PLGA
2 rich domain of the accused products is a continuous, solid
3 web of polymer material, that one of the accused stents has
4 a length-to-length ratio of 163, including a biodegradable
5 polymer fiber format, that the coatings on the side of the
6 stent can be compared to a ribbon, and that Boston
7 Scientific had described the fibers as a "string," and
8 measured their "string length."

9 Under the *Pennypack* factors, the Court should --
10 the Court will permit Dr. Pitt to testify that the polymer
11 coating of the accused Synergy stent contains a fiber that
12 meets the limitation in claim 1 of the '296 patent, that it
13 contains at least one biodegradable polymer fiber.

14 Dr. Pitt's prior opinions put Boston Scientific
15 on notice that Dr. Pitt thought that the polymer coating on
16 Boston Scientific's stent infringed claim 1 of the '296
17 patent, even if construed as requiring a fiber that is
18 thread-like.

19 Thus, if there is any surprise or prejudice to
20 cure, it is minimum. Further, UT demonstrated no bad-faith
21 since Pitt gave his opinions based on Judge Noreika's
22 initial construction of the term "fiber." However, if
23 Boston Scientific were to ask Dr. Pitt whether he had at any
24 point in this case opined that the polymer coating on Boston
25 Scientific's accused stents is thread-like, Dr. Pitt would

1 have to answer no.

2 For these reasons and subject to the parameters
3 the Court has set forth, the Court denies Boston
4 Scientific's motion in limine number one.

5 Moving to Boston Scientific's motion in limine
6 number two, which seeks to exclude certain evidence and
7 testimony unrelated to the structure of the accused Synergy
8 stent. That motion in limine is also denied with the caveat
9 Federal Rule of Evidence 402 limits admissible evidence to
10 relevant evidence. While Rule 403 provides that the Court
11 may exclude relevant evidence if its probative value is
12 substantially outweighed by danger of unfair prejudice,
13 confusing the issues or misleading the jury.

14 Evidence is relevant if it has any tendency to
15 make a fact more or less probable than it would be without
16 the evidence, and the fact is of consequence in determining
17 the action.

18 UT seeks to use the Strickler patent both to
19 show that Boston Scientific admits that an implied coating
20 on similar products to the accused products are fibers and
21 to show that Boston Scientific was aware of the '296 patent.

22 UT connects the Strickler patent to Boston
23 Scientific via the role of Boston Scientific's attorney that
24 oversaw the Strickler patent's prosecution for Cymed.

25 UT seeks to use the particulate matter documents

1 to show Boston Scientific's understanding of the coating
2 found on the Synergy stent as a whole being a fiber.

3 UT states Boston Scientific told the FDA that
4 particulates released from the accused Synergy stent are
5 patterned to a shape of the underlying stent geometry with
6 resulting structure resembling a ribbon. Thus, in both
7 cases, UT seeks to use evidence for proper purposes and
8 provides a reason that the evidence is relevant.

9 However, a direct infringer's knowledge or
10 intent is relevant. Here, knowledge of intent for induced
11 infringement and willfulness will only be part of the second
12 phase of the trial. Therefore, UT may not present evidence
13 of Boston Scientific's knowledge of the '296 patent in phase
14 one.

15 With respect to Boston Scientific's motion in
16 limine number three seeking to exclude evidence and
17 testimony related to TissueGen's compliance with 35 U.S.C.
18 287 marking and pre-suit damages.

19 Let me ask UT two questions before I rule on
20 this.

21 Does UT contend that it marked any products sold
22 before this suit was filed with the '296 patent?

23 MR. SHORE: Yes; with a small explanation.
24 There was never a mark placed on a device because it's a
25 coating. Some of these samples were provided to a third

1 party under an NDA and that nondisclosure agreement in it
2 and that work included a license to the technology,
3 including the technology of the '296 patent.

4 So the person or the entity that was receiving
5 these samples was actually a sublicensee and there was no
6 requirement to mark. These were samples, they were not sold
7 to the public and they were provided under a nondisclosure
8 agreement.

9 There were other things given out at a trade
10 show, but those items didn't have any drug in them. So they
11 didn't infringe because there was no drug in the fiber, in
12 the samples that were disclosed. So we haven't seen them
13 under *Arctic Cat* identify any specific products, not one.
14 They haven't identified a single public sale. There have
15 been no public sales, there were no public sales, and
16 there's no evidence of a public sale. So to us the entire
17 marking issue is -- to us it's a red herring. It's a -- you
18 know, it's a rabbit trail -- or rabbit hole, whatever they
19 call it.

20 But, no, we don't believe that the marking
21 requirement was ever triggered. But to the extent it was
22 triggered, the patent was disclosed to some of the people
23 who received products under an NDA. And so if they're going
24 to argue that those particular products were unmarked, we're
25 going to get up on -- I don't think as a matter of law that

1 you have to mark something that you provide to a licensee on
2 the patent under an NDA.

3 So this is not a situation where there were
4 things put on the market, advertised, sold, the usual
5 marking issue, that does not exist here. And under *Arctic*
6 *Cat*, they have still never identified a product number,
7 because there were no product numbers. There were no part
8 numbers, product numbers, whatever you want to call it.
9 These were private transactions pursuant to consulting
10 agreements or pursuant to NDAs that were not public and I
11 don't think anyone is even alleging that they were public.

12 THE COURT: All right. I understand.

13 So --

14 MR. DROWN: Your Honor --

15 THE COURT: Do you want to respond?

16 MR. DROWN: Yeah, I think it makes sense to
17 answer directly Your Honor's question, and that is, you
18 asked: Do they contend that they ever marked anything? And
19 the answer is no. They said that earlier in the hearing.

20 Dr. Nelson, what they call the lead inventor
21 here, there are actually a number of inventors, specifically
22 was asked that question at his deposition. And we have it
23 right here.

24 I have no evidence to support that we ever
25 labeled -- ever put on the packaging the '296 patent. And

1 you know why he said that? He said ignorance. That's in
2 our brief.

3 "QUESTION: Why did TissueGen not label any of
4 its fibers with the '296 patent?

5 "ANSWER: Ignorance, I guess."

6 Just so Your Honor has an answer to your
7 question, the answer is they never marked anything.

8 THE COURT: Okay. So I have heard enough, I'm
9 going to rule, okay.

10 MR. SHORE: There was no marking on packaging.

11 THE COURT: So with respect to Boston
12 Scientific's motion in limine number three, the Court is
13 going to deny this motion in limine.

14 Boston Scientific seeks to preclude UT from
15 introducing evidence that certain fibers made or sold by
16 TissueGen are not embodiments of the '296 patent and any
17 evidence or argument concerning pre-suit damages. Boston
18 Scientific argues that UT stated during discovery that
19 TissueGen had made several fiber products that were prepared
20 according to processes described in the '296 patent, a
21 statement UT later rescinded. And that Boston Scientific
22 then served notice identifying four unmarked fibers made by
23 TissueGen that appeared to be embodiments of the '296 patent
24 claims.

25 Boston Scientific argues that UT provided no

1 evidence or expert opinion to dispute either that the
2 identified fibers were marked or the identified fibers did
3 not practice the claims of the '296 patent.

4 Boston Scientific argues that UT should not be
5 allowed to introduce lay witness testimony to prove the --
6 to prove that the identified fibers do not practice the '296
7 patent at trial.

8 Boston Scientific further argues that compliance
9 with Section 287 is the patentees' burden, not Boston
10 Scientific's burden, so it did not have to plead section 287
11 marking as an affirmative defense.

12 Also Boston Scientific argues that TissueGen
13 paid royalties on the fibers identified and thus must have
14 sold them.

15 UT admits that counsel to Boston Scientific
16 suggested that four products practice the '296 patent of a
17 VEGF loaded emulsion fiber sold by TissueGen to Dr. Pedran
18 Bluni an emulsion fiber loaded with lidocaine for Teva
19 pharmaceutical industries. Fibers prepared for Edge
20 Therapeutics and biodegradable drug-loading fiber products
21 made, offered for sale and/or sold under the TissueGen ELUTE
22 trademark.

23 However, UT argues that the ELUTE trademark
24 referred to multiple products regardless of whether they
25 contain any drug, the syringes of VEGF gel were sold from

1 TissueGen to UT, the samples sent to Teva were sent abroad
2 for testing and the samples sent to Edge were for testing
3 under a confidential development contract.

4 UT also argues that Boston Scientific never
5 included a specific unmarked product in its section '296
6 defense in its answer to first-amended complaint for patent
7 infringement filed after the close of fact discovery.

8 Second, UT argues that no sales occurred and
9 that Boston Scientific was provided with actual notice of
10 infringement before 2013.

11 Third, UT argues that it can present a fact
12 witness to show that public samples did not contain drug and
13 that test samples were designed with drug and continuous
14 channel rather than discrete regions.

15 The legal standard is if a patentee fails to
16 mark a patented product, no damages shall be recovered by
17 the patentee in any action for infringement except on proof
18 that the infringer was notified of the infringement and
19 continued to infringe thereafter, in which again damages may
20 be recovered only for infringement occurring after such
21 notice. Thus, once a patentee begins making or selling a
22 patented article, the notice requirement attaches. And that
23 comes from the *Arctic Cat* decision.

24 The alleged infringer must initially articulate,
25 produce, not prove, the product it believes are unmarked,

1 patented articles subject to section 287.

2 Next the patentee bears the burden to prove the
3 products identified do not practice the patented invention.

4 Here, with respect to was notice given of a
5 failure re-mark -- whether notice was given of a failure to
6 re-mark. The alleged infringers initial burden of
7 production is a low bar and need only put the patentee on
8 notice that he or his authorized licensees sold specific
9 unmarked products which the alleged infringer believes
10 practiced the patent. It is a burden of production not one
11 of persuasion or proof. At least one District Court found
12 that identifying a product, even if it has hundreds of
13 different versions meets this burden.

14 Another court found that identification of
15 specific products of infringement contentions in a related
16 case and by agreement meet the low bar.

17 Here, Boston Scientific asks UT to identify each
18 past or present product of UT that incorporates or embodies
19 any invention claimed in the patent-in-suit and to identify
20 the dates during which each product was marked under 35
21 U.S.C. section 287.

22 TissueGen stated in a revised interrogatory
23 response that it has been involved in several technical
24 development projects which included, one, providing
25 drug-loaded fibers, drug compositions to Dr. Pedran Bluni

1 and paying UT a royalty of \$514.06 or five percent of
2 revenue.

3 Two, working with Teva on developing a
4 biodegradable polymer fiber loaded with lidocaine and paying
5 UT \$1,500 or five percent of revenue. Another payment of
6 \$3,140.

7 And, three, developing a fiber loaded with a
8 protein called aprotanin (phonetic) with Edge and paying UT
9 \$13,732.50 with three percent revenue. And then another
10 paid \$3,124.50.

11 Dr. Kevin Nelson admitted the TissueGen did not
12 mark any of its products with the '296 patent during his
13 March 15, 2022 deposition.

14 On January 26, 2022, Boston Scientific informed
15 UT that UT and their licenses were engaged -- and their
16 licensees were engaged in the making, offering for sale or
17 selling within the U.S. articles falling within the scope of
18 the claims of the '296 patent and identified, one, VEGF
19 loaded emulsion fiber sold by TissueGen to Dr. Pedran Bluni.
20 Two, emulsion fiber loaded with lidocaine for Teva
21 Pharmaceutical Industries. Three, fibers prepared for Edge
22 Therapeutics. And, four, biodegradable drug-loaded fiber
23 products, made, offered for sale and/or sold under the
24 TissueGen ELUTE trademark.

25 Thus, the Court finds that Boston Scientific met

1 its burden of production. UT's interrogatory responses make
2 clear that the first three were specific products and that
3 each resulted in royalty payments to UT.

4 The ELUTE trademark identifies a specific family
5 of problems while UT alleges that the ELUTE trademark was a
6 house mark for fibers TissueGen could make not a specific
7 product regardless of how or whether they contained any
8 drug. UT's notice specifically identified biodegradable
9 drug-loaded fiber products with that house trademark. Such
10 a clearly identifiable product set could not permit the
11 large-scale fishing expedition that *Arctic Cat* one court
12 feared.

13 With respect to whether UT has met its burden of
14 proof, UT argued that it must be allowed to prove no sales
15 occurred and that they controlled confidential test samples
16 or sent them abroad. Boston Scientific's response that UT
17 cannot pursue a contention that they did not sell the
18 identified fibers because they did not disclose that in
19 discovery and because TissueGen paid royalties on the
20 identified fibers, which is only required for sales.

21 Further, Boston Scientific argues that UT cites
22 no law supporting a confidential sale or manufacturing
23 exception to marking.

24 TissueGen must pay royalties only on UT net
25 sales for licensed products. A sale is a bona fide

1 transaction for which consideration is received or expected
2 for the sale, use, lease, transfer or other disposition of a
3 UT licensed product. Boston Scientific does not contest
4 that sending a product abroad is sufficient to exempt it
5 from the marking requirement. And UT says it sent the
6 products sold to Teva abroad.

7 UT offers no reason why sales under a
8 confidential development contract are exempt from the legal
9 marking requirement. However, UT contends that it can prove
10 no sales occurred. If UT could prove that it never made any
11 sales of unmarked products, which seems likely, given its
12 royalty payments, UT could win on the marking issue.

13 Thus, under these parameters, the Court will
14 deny Boston Scientific's motion in limine number three.

15
16 Let me correct the record. I should have said
17 that if UT could prove that it never made any sales of
18 unmarked products, which seems unlikely, given its royalty
19 payments, UT could win on the marking issue.

20 Thus, the Court, for the reasons stated and the
21 parameters set forth, the Court denies Boston Scientific's
22 motion in limine number three.

23 All right. So that takes care of all of the
24 motions in limine. And that's all I had on my agenda, with
25 the exception of juror lunches.

1 The Court is no longer able to pay for juror's
2 lunches and so the Court asks the parties to pay and take
3 care of the logistics for delivering the juror's lunches
4 during the trial.

5 Both sides fine with that?

6 MR. GRIMGRUD: Yeah, that's fine, Your Honor.

7 MR. SHORE: Yes, Your Honor.

8 THE COURT: Okay.

9 All right. That's all I have on my agenda.
10 Anything else that we need to discuss?

11 MR. GRIMGRUD: We had one other issue, Your
12 Honor, that we wanted to raise. The plaintiffs -- it
13 relates to a model that the plaintiffs disclosed to us
14 recently that they're intending to use at trial. There is a
15 process in the proposed pretrial order for dealing with
16 objections to demonstratives. This one, they gave us notice
17 of, they say it's a model of the Synergy stent. We think
18 there's all sorts of evidentiary problems with it, we don't
19 think it's representative of the stent at all, that there's
20 foundational issues, undisclosed expert opinion issues, 403
21 issues, relevance issues, a lot of other issues. So we
22 wanted to just give the Court a head's up about that. We
23 thought perhaps this would be an issue where it makes sense
24 to maybe raise it sooner to the Court with some short
25 briefing process rather than waiting for the objection

1 period, you know, under the pretrial order.

2 THE COURT: Okay. So why don't the parties meet
3 and confer about that demonstrative, see whether you can
4 come up with some acceptable alternative. If not, then
5 submit a letter of no more than three pages, both sides.
6 Since Boston Scientific is opening the -- you submit first
7 and then UT will have -- submit its responsive -- its
8 answering, three-page letter brief 24 hours after Boston
9 Scientific submits its.

10 MR. GRIMGRUD: Yes, Your Honor. And I'm sorry
11 if I missed it, is there a time where we should submit ours,
12 a date?

13 THE COURT: So you should --

14 MR. GRIMGRUD: Or just meet and confer?

15 THE COURT: If you guys can't resolve it.

16 MR. GRIMGRUD: Okay.

17 THE COURT: Then submit it -- the opening by the
18 end of the day on Thursday.

19 MR. GRIMGRUD: Okay.

20 THE COURT: And that'll give UT to Friday to
21 submit its answering.

22 MR. GRIMGRUD: Understood. Thank you, Your
23 Honor.

24 MR. SHORE: Your Honor, the only thing I would
25 add to that is that under the Court's order, we're supposed

1 to provide, I believe, demonstratives 48 hours before their
2 use or something to that effect.

3 THE COURT: But this is one that you already
4 gave notice of, so they flagged it.

5 MR. SHORE: Fifty-one days in advance. We
6 didn't just give them notice, we invited them to inspect,
7 which they declined. And if I -- may I approach, Your
8 Honor?

9 THE COURT: I don't need to get into the merits
10 of it right now. Let's just have you guys meet and confer.
11 If you can agree, you can agree. If you can't, then submit
12 your respective positions and we'll --

13 MR. SHORE: I just want to make clear, 51 days.

14 THE COURT: I understand. I understand.

15 MR. SHORE: The other -- there's two other small
16 issues, one I'll handle and the other Mr. Lipschutz will
17 handle.

18 How does the Court want to handle bills, bill of
19 review, proffers of evidence? In other words, if there's a
20 point where we run out of time, which I don't think we will,
21 but I hope we don't, or if -- as far as the Court granting
22 motions in limine, if there's evidence that we believe that
23 we should have been able to offer, if we want to make an
24 offer, do you want those in writing or do you want us to
25 come in before trial and put the witness on?

1 You don't have to answer this now, but we would
2 like to know for the purposes of making sure we have the
3 right witnesses here, who we may need to make a bill or an
4 offer, just let us know, if you will, how you'd like to
5 handle that.

6 THE COURT: You should give me, you know, as
7 much notice, advanced notice as possible if you see the
8 issue coming up. And you should, to the extent possible,
9 yeah, do it in writing in advance.

10 Again, with respect to the dispute resolution
11 procedure, to get anything that you anticipate happening
12 being an issue during the next --

13 MR. SHORE: I just didn't know if you wanted it
14 in question and answer with the witness or if you wanted it
15 simply as a proffer in writing saying if we had been
16 allowed, this is what we would have put on.

17 And sometimes --

18 THE COURT: Well, it depends upon the
19 circumstance.

20 MR. SHORE: Okay.

21 All right, thank you, Your Honor.

22 And then Mr. Lipschutz has one issue on a
23 subpoena.

24 THE COURT: Okay.

25 MR. LIPSCHUTZ: Good evening, Your Honor. Corey

1 Lipschutz.

2 As Mr. Shore hinted at earlier, plaintiff served
3 a trial subpoena directed towards Boston Scientific
4 Corporation, it was served under Delaware registered agent.

5 The subpoena seeks trial testimony. And we
6 conferred already with opposing counsel on the subpoena and
7 it identifies several topics of testimony that we seek
8 Boston Scientific to produce a corporate representative on.

9 In our meet and confer, as well as the
10 objections that have been served by Boston Scientific, they
11 oppose this and contend the subpoena is improper.

12 With respect to the subpoena, there's four
13 issues that the Court really needs to confront or deal with
14 to determine the propriety of the subpoena.

15 First, can plaintiffs call Boston Scientific,
16 the opposing party, during its own case-in-chief. And the
17 answer is yes, it's well established a party can call an
18 adverse witness. The authority for that is Federal Rules of
19 Evidence 611(c), which states when a party calls a hostile
20 witness, an adverse party where a witness identified with an
21 adverse party, so that's clearly identified in the rules.

22 Second, that presents the issue of what's the
23 proper means for us as plaintiffs to compel and command the
24 attendance of witnesses, because witnesses are not
25 necessarily required to sell it to trial unless they are

1 compelled by subpoena. And case law does dictate that the
2 proper mechanism to obtain compliance that an opposing party
3 shows up at trial is through a subpoena, even though
4 subpoenas aren't necessary to compel opposing parties to
5 respond to discovery, they are necessary to get their
6 attendance at trial.

7 The plain text of Rule 45(c)(1) makes clear, a
8 subpoena may command a person to attend trial. And the word
9 "person," as used throughout the Federal Rule of Civil
10 Procedure, includes both natural persons as well as --

11 THE COURT: All right.

12 All right. So it's getting six o'clock and I
13 want to give the court reporter a break. So let me just
14 hear from Boston Scientific about what's the issue in
15 complying with this subpoena?

16 I understand your argument.

17 MR. DRAWN: Yes, Your Honor. I think we should
18 just do what Your Honor suggested with the other things
19 by -- they can file a motion, they can file their brief
20 supporting it and we can respond.

21 But here's the issue: This is a trial subpoena
22 where they are trying to compel Boston Scientific, like a
23 30(b)(6) deposition, to designate a human being to come to
24 trial and be prepared to testify on listed-specific topics.
25 Absolutely unsupported by the rules. Rule 30 doesn't allow

1 you to do this. There's a bunch of cases that say this -- I
2 have never seen a court do this at any trial, so we think
3 the Court can knock this down right now, but if you want to
4 have briefing on it, there's no basis to compel a company to
5 bring a human being and be prepared at trial to testify on
6 topics like we're in the middle of discovery, so...

7 THE COURT: Did you do this during discovery on
8 these topics?

9 Did you illicit this during discovery?

10 MR. LIPSCHUTZ: Yes, Your Honor, we do have
11 30(b)(6) testimony from defendants on --

12 THE COURT: On these topics?

13 MR. LIPSCHUTZ: On these topics, but we wish to
14 compel a live witness. And contrary to the authority -- to
15 the position stated by Boston Scientific, there is in fact
16 case law that supports this position of subpoenaing a
17 party -- an opposing party through the use of designation of
18 topics when they are a corporate entity.

19 THE COURT: Okay. So let's have the parties
20 submit their respective letter briefing on this topic. And
21 let's have UT submit its opening letter brief, no more than
22 three pages, on this topic before the end of the day on
23 Wednesday. And then Boston Scientific gets to submit its
24 answering letter brief, no more than three pages, before the
25 end of the day on Thursday. And then the Court will --

1 MR. LIPSCHUTZ: We're happy to follow that
2 schedule, Your Honor. We just point out typically the
3 mechanism in this case would be the party opposing the
4 subpoena would typically seek a motion to quash, so it may
5 make sense for Boston Scientific to go first. If you
6 prefer, we're happy to submit briefing as you said, but it
7 would seem typical for the parties seeking to quash the
8 subpoena to go first.

9 THE COURT: Well, all right, let's have -- yeah,
10 because they did serve you with a subpoena --

11 MR. DROWN: We objected to it.

12 THE COURT: Okay. But it's your burden to quash
13 the subpoena, so let's have you start with the opening and
14 then have UT submit its answering brief on Thursday. So
15 Boston Scientific by end of the day Wednesday, UT by end of
16 the day on Thursday.

17 MR. LIPSCHUTZ: Yes, Your Honor.

18 THE COURT: All right. So that is all that
19 we're going to cover today. We'll expect the revised
20 instructions and documents that we've gone over today,
21 consistent with the schedule that I gave you and the
22 briefing on the issues that we've identified as being in
23 dispute according to the schedule that I've given the
24 parties, and I would urge the parties to meet and confer and
25 try to resolve some of these issues. Because you have a

1 limited amount of time at trial and the Court is going to
2 stick to that time allotted, so the more time we take for
3 disputes and arguments and stuff, the less it's going to
4 take from your time to try this case. And you got two
5 phases that you need to get tried, so... maybe. So that's
6 just the Court imploring you to try to agree to as much as
7 you can get done.

8 So I want to thank everybody's time today. Good
9 job on both sides on the issues. And we'll see you in I
10 guess two weeks.

11 ALL COUNSEL: Thank you, Your Honor.

12 MR. SHORE: Your Honor, I will get in trouble if
13 I don't pass this on -- this can be on or off the record,
14 but Judge Albright in Waco told me to pass along to you his
15 greetings and salutations and goodwill, and so I'm doing so.

16 THE COURT: All right. Thank you. Tell him I
17 said hi.

18 (Whereupon, the following proceeding concluded
19 at 6:04 p.m.)

20 I hereby certify the foregoing is a true
21 and accurate transcript from my stenographic notes in the
22 proceeding.

23 /s/ Michele L. Rolfe, RPR, CRR
24 U.S. District Court
25

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